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No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD W. (DICK) RYLANDER, SR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General
GLENN L. ARCHER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
JERROLD J. GANZFRIED
Assistant to the Solicitor General
ERNEST J. BROWN
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
JO-ANN HORN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Rylander could not be convicted of criminal contempt for willfully failing to comply with a final court order requiring production of summoned records that was upheld by this Court last Term, unless the government relitigated and proved beyond a reasonable doubt the facts underlying the entry of the disobeyed order, despite the fact that a prima facie showing of contempt was made and respondent offered no evidence in his defense.

2. Whether the court of appeals erred in holding that respondent had not knowingly and intelligently waived his right to counsel.

3. Whether respondent was entitled to a trial by jury on a charge of criminal contempt for failure to comply with a court order, where the sentence imposed was six months' imprisonment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 714 F.2d 996. The opinion of the district court (App., *infra*, 25a-31a) is not reported. An earlier opinion of the district court denying respondent's motion for a jury trial (App., *infra*, 38a-39a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1983 (App., *infra*, 24a). On October 24, 1983, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including December 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * and to have the Assistance of Counsel for his defence.

18 U.S.C. 401 provides, in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

26 U.S.C. 7402(b) provides:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

26 U.S.C. 7604(a) provides:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

STATEMENT

1. This criminal contempt case is a sequel to this Court's decision in *United States* v. *Rylander*, No. 81-1120 (Apr. 19, 1983) *(Rylander I)*, and arises out of

the same factual setting and district court proceedings that resulted in *Rylander I*. Following a joint trial for civil and criminal contempt, the district court convicted respondent on two counts of criminal contempt, for failing to produce records and documents pursuant to a January 15, 1980 order enforcing Internal Revenue Service summonses and for failing to appear at a show cause hearing on March 24, 1980.[1] It also held him in civil contempt for failure to comply with the court's enforcement order. Although they were tried together, the civil and criminal cases were considered separately by two different panels of the Ninth Circuit. On respondent's appeal in the civil case, the court of appeals reversed the order holding respondent in contempt. That decision was before this Court last Term in *Rylander I*, in which the judgment of the court of appeals was reversed and the district court's finding of civil contempt reinstated.

After this Court's disposition of *Rylander I*, the court of appeals considered respondent's appeal from his conviction for criminal contempt. Once again, it reviewed the evidence giving rise to the enforcement order that respondent was convicted of disobeying and, despite this Court's decision to the contrary in *Rylander I*, held that there was insufficient evidence to support the conviction. It also reversed the conviction for failure to appear at the show cause hearing, and ordered a new trial on that charge, on the ground of an insufficient waiver of the right to counsel. The court reached this conclusion despite the fact that respondent had twice discharged counsel appointed by the district court (although he had refused to complete a financial disclosure statement), and elected to proceed pro se when the district court declined to appoint counsel of

[1] In the same trial, Rylander was found not guilty of criminal contempt for avoiding process to appear at a show cause hearing on February 22, 1980.

respondent's selection and instead gave him the option of accepting one of the counsel appointed by the district court, obtaining counsel of his choice, or representing himself at the contempt hearing. See Tr. 45, 61-66, 127.

2. Since the conviction for criminal contempt results from the same background and judicial proceedings as the finding of civil contempt previously considered by this Court, the facts may be summarized largely in terms of this Court's opinion in *Rylander I* (slip op. 1-2), as follows:

In January 1979, pursuant to 26 U.S.C. 7602, the Internal Revenue Service (IRS) issued summonses to respondent Rylander as president of Rylander & Co. Realtors, Inc. and of Affiliated Investments and Mortgage Company, dba AIM Real Estate Marketing and Counseling. The summonses ordered him to appear before an IRS agent in Sacramento, California, and to produce for examination, and testify with respect to, books and records of the corporations. When he failed to comply with the summonses, the district court issued an order to show cause why the summonses should not be enforced. For several months Rylander succeeded in evading service, but in November 1979, the marshal was able personally to serve the court's fourth successive order to show cause. In January 1980, on the return date of that order, Rylander failed to file a responsive pleading and did not appear at the show cause hearing. He had sent an unsworn letter to the court claiming he was neither the president of either corporation nor associated with either of them in any way. At the hearing, the government established the factual basis for enforcing the summonses. See *United States* v. *Powell*, 379 U.S. 48 (1964). The district court, after receiving an offer of proof and hearing evidence, enforced the summonses and ordered Rylander to appear before an IRS agent in February 1980, to produce the corporate records.

Rylander neither sought reconsideration of the enforcement order nor did he appeal from it. He appeared on February 4 before the agent, but failed to produce the records. On February 11, the district court issued an order requiring Rylander to appear on March 10, 1980, to show cause why he should not be held in contempt for failure to comply with the order enforcing the summonses. The order required service by February 20, but the marshal was unable to effect personal service by that date, and a new show cause order was issued on February 25, and served by mail on that date in accordance with Fed. R. Civ. P. 5(b). That show cause order required Rylander to appear on March 24 and show cause why he should not be held in contempt of the January 15 order and why he should not immediately produce the records.

Rylander did not file a response or appear on March 24. His son filed a three-page statement said to have been dictated by Rylander by telephone from Oregon. On March 28, 1980, and on April 21, 1980, the district court issued orders that Rylander show cause why he should not be adjudged guilty of criminal contempt and held also in civil contempt. The latter order was served by mail on April 22, 1980. In May 1980, the district court found that Rylander was willfully avoiding service, and issued a bench warrant for his arrest.

A hearing was held on the criminal and civil contempt charges on October 8, 1980. Prior to that time, the district court had appointed counsel to represent Rylander because Rylander had not obtained counsel, despite the fact that Rylander refused to complete a financial disclosure statement. Rylander discharged two court-appointed lawyers, and filed a demand for appointment of "competent and effective counsel." The district court informed him (Tr. 45) that his choices were representing himself, obtaining counsel of his choice, or appearing with one of the court-appointed lawyers. Al-

though Rylander would not explicitly waive his right to counsel, he chose to represent himself, and the district court found that he had "knowingly, intelligently and competently waived counsel" (Tr. 66). Rylander also demanded a jury trial on both criminal and civil contempt charges. The district court, by order of September 24, 1980, denied the demand, reciting that there was no right to a jury trial on the civil contempt charge, and that, if Rylander were found guilty of criminal contempt, the punishment would not exceed six months' imprisonment and/or a $500 fine (App., *infra*, 38a-39a).

After a nonjury trial on October 8, 1980, the district court found Rylander guilty of criminal contempt for his failure to produce the documents required by the order of January 15 enforcing the summonses and also guilty of criminal contempt for his failure to appear at the hearing to show cause on March 24 (App., *infra*, 32a-33a). In addition, he was held in civil contempt for his continued failure to produce the documents (App., *infra*, 30a). At a subsequent hearing held the next day to give respondent an opportunity to purge himself of civil contempt, Rylander verified an "Oath in Purgation of Contempt" that he had submitted to the court earlier that day. The essence of this declaration was that he did not possess the records and had not disposed of them to other persons, but he refused to submit to additional questioning under oath from the government (*Rylander I*, slip. op. 2). At the conclusion of these proceedings, Rylander was ordered incarcerated until he produced the summoned records or testified as to why he could not do so. On the criminal contempt charges, he was sentenced to six months' imprisonment, to commence upon his release from the civil contempt incarceration, for disobeying the court's order to produce the summoned documents, and to an additional six months' imprisonment, to run concurrently with the first six

months' sentence, for failing to appear at the March 24 show cause hearing (App., *infra*, 34a-35a).[2]

3. The court of appeals reversed the conviction for criminal contempt for failure to produce documents on the ground that the evidence to support the order that Rylander was convicted of violating was "not sufficient to establish beyond a reasonable doubt his ability to produce the summoned documents in January 1980" (App., *infra*, 11a). The court held that while, under this Court's decision in *Rylander I*, the prior proceeding precluded Rylander's lack of possession defense to the civil contempt citation, that was not true of the criminal contempt conviction. "In the criminal contempt proceeding, the Government was required to prove all elements of the offense, including an ability to comply with the order, beyond a reasonable doubt" (App., *infra*, 9a-10a). The government's evidence supporting the district court's order to produce, the court held, was insufficient to meet that standard (*id.* at 10a-11a).

The court of appeals reversed the conviction for failure to appear at the show cause hearing of March 24 on the ground that "the record does not indicate that Rylander understood the nature of the charges or the possible penalties at the time he waived counsel" (App., *infra*, 16a). The court reached this conclusion and remanded for a new trial on this charge, although it acknowledged that "the district judge exhibited great pa-

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[2] In a separate case, respondent was convicted on October 13, 1982, on three counts of failure to file income tax returns, in violation of 26 U.S.C. 7203. He was sentenced to consecutive six-month terms of imprisonment on each of the three counts. This sentence was to be served concurrently with the sentence imposed as a result of the criminal contempt conviction. Respondent has been incarcerated at the Federal Prison Camp in Boron, California, since October 7, 1983, on his failure to file conviction. He has not begun to serve his sentence for criminal contempt.

tience with Rylander on the matter of Rylander's representation" (*id.* at 15a-16a).

In dictum, the court also stated that respondent was entitled to have the charge of failure to comply with the enforcement order tried by a jury. (App., *infra*, 16a-18a). Since the conviction on this charge was reversed on a ground that precluded retrial, the court's comments on the right to a jury trial played no role in the disposition of that charge. On the remaining criminal charge (failure to appear at the March 24 hearing), the court of appeals stated that respondent was not entitled to a jury trial so long as he is not sentenced to more than six months' imprisonment or fined more than $500 (*id.* at 17a).

Judge Poole dissented from the reversal of the failure to appear charge (App., *infra*, 19a-23a). Noting that respondent's "adamant refusal to comply with any order of the court was part of a pattern" (*id.* at 21a), he would have found that the absence of counsel did not warrant setting aside the conviction. In addition, he disagreed with the majority's statement that Rylander was entitled to a jury trial on the failure to comply charge.

REASONS FOR GRANTING THE PETITION

1. Once again, and despite the clarity of this Court's opinion in *Rylander I*, the Ninth Circuit has failed to understand the basis for a citation for contempt, and has undermined the ability of district courts to obtain compliance with their orders. In *Rylander I*, this Court reaffirmed the long-standing rule, set forth in *Maggio* v. *Zeitz*, 333 U.S. 56, 59 (1948), "that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy" (*Rylander I*, slip. op. 4). This is as true of criminal contempt as it is of civil contempt. *United States* v. *Mine Workers*, 330 U.S. 258, 289-295 (1947). Indeed,

many citations for criminal contempt grow out of disobedience to orders issued in civil cases, and 18 U.S.C. 401(3) would do little to vindicate the authority of the court issuing the order in such cases if the judge considering criminal contempt were required to search the record of the civil proceeding to determine not only whether there was evidence to support the disobeyed order but also to apply to that evidence the standards applicable in a criminal prosecution.

This Court has held that a trial court need not and an appellate court should not undertake such a search—that a criminal contempt proceeding does not reopen the underlying civil case and subject the issues in that case to redetermination under an enhanced burden of proof. Indeed, as this Court has held, a conviction for criminal contempt by disobedience to a court's order will stand even if the order is ultimately ruled incorrect. *Howat* v. *Kansas*, 258 U.S. 181, 189-190 (1922); *Maness* v. *Meyers*, 419 U.S. 449, 458-459 (1975); *Worden* v. *Searls*, 121 U.S. 14 (1887). The orderly and expeditious administration of justice by the courts requires no less: litigants are not free to decide for themselves whether court orders should be obeyed. Such orders must be obeyed, subject only to an aggrieved party's seeking further relief by a stay or appeal.

Here, however, the court of appeals rewarded Rylander's intransigence and obstinacy by reversing his criminal contempt conviction for failure to comply with the district court's order. In so doing, the court vindicated Rylander's self-help approach to the administration of justice in preference to the integrity of the judicial process. As Judge Poole's partial dissent observes (App., *infra*, 21a), "it [is] difficult to comprehend how we expect obedience to valid court orders if we tolerate willful and sustained contumacy." But that is precisely what the Ninth Circuit has done, by placing on the gov-

ernment the burden of relitigating and proving beyond a reasonable doubt the facts that were established in the earlier summons enforcement proceeding. This decision not only conflicts with *Rylander I*, in which this Court held that the enforcement order established respondent's ability to comply with the summonses and observed (slip op. 5) that "the District Court was entirely justified in concluding * * * that Rylander 'failed to introduce any evidence at the contempt trial,'" but also with the decisions in *McPhaul* v. *United States*, 364 U.S. 372 (1960), and *United States* v. *Fleischman*, 339 U.S. 349 (1950), on the proper allocation of the burden of proof in criminal contempt cases.

2. In a criminal contempt case, the only elements that must be proved to establish the contempt are (1) that a valid order has been entered, (2) that the alleged contemnor has actual notice of the order, and (3) that the order was willfully disobeyed. *Chapman* v. *Pacific Telephone & Telegraph Co.*, 613 F.2d 193, 195 (9th Cir. 1979); *In re Allis*, 531 F.2d 1391, 1392 (9th Cir.), cert. denied, 429 U.S. 900 (1976). See *McPhaul* v. *United States*, *supra*; *United States* v. *Fleischman*, *supra*.

The show cause order places upon the alleged contemnor the burden of showing why he should not be convicted of contempt. *McPhaul* v. *United States*, *supra*; *United States* v. *Fleischman*, *supra*. It does not require that the order be derived from evidence that establishes its factual correctness beyond a reasonable doubt. In holding that the violated order should itself be the focus of controversy, and that the evidentiary support for that order should be tested by a standard inappropriate to the proceeding that gave rise to the order, the court of appeals in this case flew in the face not only of this Court's decision in *Rylander I*, but also of an unbroken line of earlier decisions. As a practical matter, the decision below gives the recipient of a summons, or of any other form of compulsory process, two

bites at the apple. He may contest the summons at the enforcement hearing and raise all appropriate defenses, or he may do nothing. Then, after the enforcement order is entered he may unilaterally choose to disobey and, perhaps months later, at the contempt trial, seek to avoid any criminal contempt sanction for his contumacious behavior by reopening the questions litigated in the enforcement proceeding, while retaining the ability to avoid any civil contempt sanction by tardily producing the requested documents. If this were all the court of appeals had approved here, it would be bad enough. But the court has gone even further. Here, Rylander persisted in his obstinacy at the contempt hearing and offered no evidence, as this Court recognized last Term. Despite this clear holding, the court of appeals found (App., *infra*, 10a) (footnote omitted) that "[t]here was evidence in the record that Rylander was unable to comply with the order because the documents either did not exist or were not within his possession or control."[3] Thus, Rylander has been permitted to avoid criminal liability although he bypassed two opportunities for presenting his defenses: by failing to appear at the enforcement hearing and by choosing not to introduce evidence at the contempt trial.

He goes free because the court of appeals has misconstrued the burden of proof. Once the government made a prima facie showing of Rylander's failure to comply with a valid court order, the burden shifted to respondent "to present some evidence to explain or justify his

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[3] The evidence to which the court of appeals adverted (App., *infra*, 10a) was introduced *by the government* and did not establish the points the Ninth Circuit found. Indeed, on the very same record, this Court reached the contrary conclusion in *Rylander I*.

refusal." *McPhaul* v. *United States*, 364 U.S. at 379; *United States* v. *Fleischman*, 339 U.S. at 362-363.[4]

3. The court of appeals also erred in reversing Rylander's conviction for criminal contempt for failure to appear at the March 24 hearing "[b]ecause the record does not indicate that Rylander understood the nature of the charges or the possible penalties at the time he waived counsel" (App., *infra*, 16a). The court, without any demonstration that it was erroneous, simply disregarded the district court's finding that Rylander "knowingly, intelligently, and competently waived counsel." It acknowledged that the district judge "exhibited great patience with Rylander on the matter of Rylander's representation" (App., *infra*, 15a), and twice appointed counsel whom Rylander discharged even though Rylander refused to complete a financial disclosure statement. Indeed, there is nothing to suggest that Rylander was unable to employ counsel. Moreover, when, as here, the investigation giving rise to the proceeding concerns compliance with the income tax laws, there is little basis for a court automatically to infer that the target of the investigation is unable to employ counsel.

As for Rylander's understanding of the nature of the charges against him or the possible penalties, the maximum penalties were established by the district court's order denying a jury trial (App., *infra*, 38a-39a). And

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[4] The Ninth Circuit sought to distinguish *Rylander I* and *Maggio* v. *Zeitz*, *supra*, on the ground that the preclusive effect of the enforcement order on *civil* contempt proceedings has no application in a criminal case where the prosecution must prove guilt beyond a reasonable doubt. But, because Rylander never presented evidence of his ability to comply, that question need not be decided in this case. Rather, the correct analysis would proceed as follows: once the government made a prima facie showing of contempt, the burden shifted to Rylander; when he opted for silence, the case was over, as in *Fleischman* and *McPhaul*.

the nature of a charge that one has violated an order to appear at a hearing at a stated place on a stated day would hardly challenge the comprehension of an average person, much less one who after months of evading service was found to have been willfully avoiding service and was made the subject of a bench warrant for arrest. In short, the record amply demonstrates that the district court correctly found Rylander's waiver of counsel satisfied the standards of *Faretta* v. *California*, 422 U.S. 806, 807 (1975), and *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).[5]

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[5] The court of appeals also stated that Rylander was entitled to trial by jury on the failure to comply charge (App., *infra*, 17a). This conclusion did not form the basis for the reversal on either count because the court barred retrial on the failure to comply count and because Rylander was not entitled to a jury on the charge of failing to appear at the March 24 hearing. Nevertheless, the court's statements on this issue presumably would govern further proceedings in this case and, accordingly, should be addressed. If the decision below is reversed, the court of appeals would presumably require a new trial on the failure to comply charge because Rylander was denied a jury trial. This is incorrect; the conviction for failure to comply should be reinstated. In *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966), this Court held that a criminal contempt could be punished by a six-month sentence—exactly what was imposed here and exactly what the district court advised Rylander was the maximum sentence—without affording a defendant a trial by jury. See also, *Muniz* v. *Hoffman*, 422 U.S. 454 (1975).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General
GLENN L. ARCHER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
JERROLD J. GANZFRIED
Assistant to the Solicitor General
ERNEST J. BROWN
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
JO-ANN HORN
Attorneys

DECEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed: September 2, 1983

Nos. 80-1813, 80-1702, 80-1703
D.C. No. CR S-80-44 LKK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RICHARD W. (DICK) RYLANDER, SR., ET AL., DEFENDANT-APPELLANT.

OPINION

Appeal from the United States District Court
for the Eastern District of California
The Honorable Lawrence K. Karlton, Presiding
Argued and Submitted June 9, 1981
Submission Withdrawn November 8, 1982
Resubmitted May 16, 1983

Before: ANDERSON, HUG and POOLE, Circuit Judges.

HUG, Circuit Judge:

Richard W. Rylander appeals his convictions of criminal contempt for willfully failing to comply with the district court's order to produce various corporate documents in response to Internal Revenue Service summonses and for failing to appear at a hearing to show cause why he should not be held in contempt. The initial difficulty arose when the IRS tried to obtain certain corporate records and documents from Rylander in order to investigate the tax returns of two corporations of which he had been president. He did not produce the records in response to an IRS summons, contending that he did not possess them. The efforts of the IRS to

enforce the summons and obtain contempt sanctions form the genesis of this case.

This case highlights the problems involved in the interrelationship of civil and criminal contempt. Rylander was tried for both civil and criminal contempt in the same proceeding. In *United States* v. *Rylander*, 51 U.S.L.W. 4367 (1983) (*Rylander I*), *reversing* 656 F.2d 1313 (9th Cir. 1981), the Supreme Court reversed this court and affirmed the civil contempt citation. Courts frequently have difficulty distinguishing between civil and criminal contempt. *See e.g.*, *United States* v. *Powers*, 629 F.2d 619, 626 (9th Cir. 1980). Procedurally, the distinction is crucial because criminal contempt proceedings, unlike civil contempt proceedings, require such protections as the sixth amendment right to counsel, the fifth amendment right not to take the witness stand, the "beyond a reasonable doubt" burden of proof, and, in some instances, the right to demand a jury trial. This case illustrates the difficulties of trying civil and criminal contempt cases together.

I
FACTS

The facts demonstrate how a simple matter can mushroom into a very complex case. It is understandable how a district judge with a busy calendar, whose contact with the case was in the form of numerous brief procedures over a period of many months, could overlook some of the complexities and subtleties.

For our purposes, this case began on January 4, 1979, when the Internal Revenue Service ("IRS") issued administrative summonses directing Richard Rylander, as president of Rylander and Company, Realtors, Inc. and Affiliated Investments and Mortgage Company, to appear before an IRS agent and give testimony regarding his tax liability and that of the two corporations. The summonses also required Rylander to produce various corporate documents. The testimony and documents were sought pursuant to an investiga-

tion into Rylander's federal income tax liability for the years 1973 through 1977. When Rylander failed to comply with the summonses, the Government petitioned the district court for enforcement under 26 U.S.C. §§ 7402(b) and 7604(a).

The district court issued orders on November 19 and 20, 1979, directing Rylander to appear before the court on January 14, 1980, and show cause why the administrative summonses should not be enforced. Rylander returned the orders to the court with a cover letter stating that he was not the president of either corporation and that he had, therefore, been improperly served. He did not appear at the hearing.

The district judge proceeded in Ryalnder's absence and, on January 15, 1980, issued an order stating:

> The Court heard an offer of proof and oral testimony and argument on the issues of (1) personal jurisdiction over the respondent corporations and (2) IRS possession of records requested in the summonses. Upon consideration of the foregoing, as well as the Declarations filed by Respondent Rylander, the verified petitions of Petitioner Van Den Berg, and the remaining records of these proceedings, the Court finds that it does have jurisdiction over the Respondents, and it is therefore hereby
>
> ORDERED that Richard (Dick) Rylander, Sr. shall appear on Monday, February 4, 1980 at 10:00 a.m. before Joan Van Den Berg, or other person designated by Petitioner, at the office of the Internal Revenue Service at 801 I Street, Room 292, Sacramento, California, and then and there produce for Petitioner's inspection and copying the records described in the IRS summonses attached hereto as Exhibits A and B, except the following records described in Exhibit A:[1]

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[1] The records to be produced were certain records from January 1, 1973 to December 31, 1977, excepting certain records in 1975 which the IRS possessed.

The order did not require Rylander to give testimony, only to produce documents.

Rylander appeared on February 4. He did not, however, bring with him any of the documents demanded by the IRS. After being informed of his fifth amendment rights, Rylander stated that he was not the president of either corporation and that he had none of the corporate documents sought. He then refused to answer any questions.

The district court subsequently issued an order on February 11 requiring Rylander to appear on March 10, 1980, and show cause why he should not be held in contempt for failure to comply with the order of January 15 enforcing the summonses. The order required that service be made by February 20. The marshall was unable to effect personal service by February 20, and a new show cause order was issued on February 25. Service was made by mail in accordance with Fed. R. Civ. P. 5(b) on that date. That show cause order required Rylander to appear on March 24 and show cause why he should not be held in contempt of the January 15 order and why he should not immediately produce the records. He was also directed to file a written response to the petition by March 17.

Rylander did not file a response or appear on March 24. However, on March 24 Rylander's son Edwin filed a three-page statement, which had been dictated by Rylander over the telephone from Oregon on Sunday, March 23. The statement informed the court that he had just received word of the order and could not appear and requested that the hearing be rescheduled. He also stated he had appeared on February 4, that he had not refused to produce the records, but that he had produced no records because he had no records.

The Government filed a petition on March 28 seeking both civil and criminal contempt. Based on that petition the court issued on order on March 28 for Rylander to

show cause why he should not be adjudged guilty of criminal contempt and why he should not be adjudged guilty of civil contempt for failure to produce the documents. The portion of the order concerning criminal contempt did not specify what particular acts or orders were the basis for the charge. It did, however, refer to the Government's petition. The petition clearly identified the failure to produce the records on February 4. It also discussed the failure to appear on March 24, although this was not singled out. The return date on this order was April 15, 1980. Repeated attempts at personal service failed and the district court continued the matter until May 27, 1980, and issued yet another order to show cause why he should not be held in both civil and criminal contempt. The order specified that constructive service be made by publication and certified mail. On May 27, when Rylander did not appear, the district judge issued a bench warrant for his arrest.

The district court appointed counsel to represent Rylander, because Rylander had not obtained counsel on his own and the district court believed it appropriate that he be represented by counsel, even though Rylander refused to complete a financial disclosure statement on fifth amendment grounds. Rylander discharged two court-appointed lawyers, believing them to be ineffective and less than zealous in their representation of him. He then filed a demand for appointment of "competent and effective counsel." The district judge told Rylander that his choices were representing himself, obtaining counsel of his choice, or appearing with one of the court-appointed lawyers. Although Rylander would not explicitly waive his right to counsel, he chose to represent himself in subsequent proceedings and the district court found he had "knowingly, intelligently, and competently waived counsel."

Rylander demanded a jury trial. This was denied because the district court determined that if a penalty

were imposed it would not exceed six months' imprisonment or $500. Rylander also moved to disqualify the district judge, alleging bias and prejudice. This motion also was denied by the district court.

On October 8, 1980, the district court conducted a combined non-jury trial on the civil and criminal contempt charges. The Government's evidence showed that Rylander had been president of both Rylander and Company, Realtors, Inc. and Affiliated Investments and Mortgage Company from 1972 until 1977. He had filed corporate income tax returns for both years that identified him as the president of both corporations. In addition, he had opened bank accounts, written checks, signed correspondence, executed contracts, and filed applications with government agencies on behalf of both business entities, all prior to 1980. The Government offered no direct proof that the documents sought were in existence and in Rylander's possession or control on or after January 15, 1980. It contended that such proof was unnecessary because the evidence presented created an inference that the documents existed and that Rylander possessed them. Rylander, appearing *in propria persona*, introduced no evidence and refused to participate in the proceedings, stating only that the district judge was disqualified from hearing the case because the judge was personally biased against him.

The district court found Rylander guilty of criminal contempt for his failure to produce the documents as required by the order of January 15 enforcing the summonses and also guilty of criminal contempt for his failure to appear at the hearing to show cause on March 24. In addition, Rylander was held in civil contempt for his continued failure to produce the documents.

In this appeal, Rylander challenges his criminal contempt convictions.

II
CRIMINAL AND CIVIL CONTEMPT

The difference between criminal and civil contempt is not always clear. The same conduct may result in citations for both civil and criminal contempt. *United States* v. *United Mine Workers*, 330 U.S. 258 (1946). The distinction between the two forms of contempt lies in the intended effects of the court's punishment. *United States* v. *Asay*, 614 F.2d 655, 659 (9th Cir. 1980). Punishment for civil contempt is intended to be either coercive or compensatory, whereas the purpose of criminal contempt punishment is punitive.

We explained the difference in *United States* v. *Powers*, 629 F.2d 619, 627 (9th Cir. 1980):

> Punishment for civil contempt is usually considered to be remedial. The penalty is designed to enforce compliance with a court order. *In re Timmons*, 607 F.2d 120, 124 (5th Cir. 1979). For that reason civil contempt punishment is conditional and must be lifted if the contemnor obeys the order of the court. *Shillitani* v. *United States*, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966). The term of punishment for civil contempt cannot extend beyond the trial proceedings since at the termination of the trial the contemnor's actions can no longer be purged. *Shillitani*, *supra* at 371, 86 S.Ct. at 1536.
>
> Criminal contempt is established when there is a clear and definite order of the court, the contemnor knows of the order, and the contemnor willfully disobeys the order. *Chapman* v. *Pacific Tel. & Tel. Co.*, 613 F.2d 193, 195 (9th Cir. 1979). The penalty is punitive in nature. It serves to vindicate the authority of the court and does not terminate upon compliance with the court's order. The punishment is unconditional and fixed. *In re Timmons*, *supra* at 124.

At the conclusion of his trial, Rylander was ordered incarcerated until he produced the summoned records or testified as to why he could not do so. The purpose of this order was coercive, so the indefinite incarceration was for civil contempt. This order was ultimately upheld by the Supreme Court. *Rylander I*, 51 U.S.L.W. at 4370.

Rylander was also sentenced to six months' imprisonment, to commence upon his release from the civil contempt incarceration, for disobeying the district court's order to produce the summoned documents, and to an additional six months' imprisonment, to run concurrently with the first six month sentence, for failing to appear at the March 24, 1980 show cause hearing. These two concurrent six month sentences were punitive in nature, imposed to vindicate the authority of the court, and therefore were punishment for criminal contempt. It is these two criminal contempt citations with which we are concerned here.

III
SUFFICIENCY OF THE EVIDENCE

Of the many grounds for reversal urged by Rylander, we turn first to his claim that the evidence was insufficient. We address this issue first, because if there was not sufficient evidence to support a conviction, the fifth amendment's double jeopardy clause bars a retrial. *Burks* v. *United States*, 437 U.S. 1, 18 (1978).

A. Failure to Produce

Rylander's criminal contempt conviction for failure to produce stems from his failure to turn over the summoned documents to the IRS on February 4, 1980, as required by the district court's order of January 15, 1980. A federal court may punish, as criminal contempt of its authority, disobedience or resistance to its lawful order. Criminal contempt is established when it is shown that the defendant is aware of a clear and defi-

nite court order and willfully disobeys the order. *United States* v. *Powers*, 629 F.2d at 627. The primary issue in this case is whether the evidence was sufficient to establish, beyond a reasonable doubt, that Rylander willfully disobeyed the court's order of January 15.

If Rylander lacked the ability to comply with the court's order, he could not be found to have willfully violated it. Thus, inability to comply with the court's order would be a complete defense. *See United States* v. *Joyce*, 498 F.2d 592, 596 (7th Cir. 1974). It is therefore relevant whether the summoned documents existed and were within Rylander's possession or control between January 15, 1980, the date the district court issued its order, and February 4, 1980, the date upon which the order required production.

The Government contends that, because Rylander did not claim lack of possession at the summons enforcement proceeding, the doctrine of *res judicata* precludes the argument that the documents did not exist or were not within his possession or control. Although in *Rylander I* the Supreme Court held that under *Maggio* v. *Zeitz*, 333 U.S. 56 (1948), the prior proceeding did preclude Rylander's lack of possession defense to the civil contempt citation, 51 U.S.L.W. at 4369, the same is not true of the criminal contempt citation. The type of issue preclusion approved in *Maggio* was intended to apply only in civil contempt proceedings. 333 U.S. at 68. It is an elementary principle of issue preclusion that it may only be asserted where the burden of proof as to that issue is no greater than it was in the prior proceeding where the issue was decided. C. Wright, A. Miller, & E. Cooper, 18 *Federal Practice and Procedure* § 4422 (1981); *see One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235 (1972) (per curiam). In the criminal contempt proceeding, the Government was required to prove all elements of the offense, including an ability to comply with the order, be-

yond a reasonable doubt. The Government's burden was substantially less in the summons enforcement proceeding. Thus, even if possession or control was established in the summons enforcement proceeding, the Government cannot assert preclusion as to that issue in the criminal contempt proceeding.

There was evidence in the record that Rylander was unable to comply with the order because the documents either did not exist or were not within his possession or control.[2] Two witnesses testified as to Rylander's February 4 appearance at the IRS office, where Rylander stated that he was unable to produce the summoned documents because he did not have them. In addition, the three-page statement dictated by Rylander and filed by his son, Edwin, at the March 24 hearing was admitted into evidence. In that statement Rylander said that he had no such documents and was therefore unable to produce them as ordered on February 4. This evidence, even though introduced by the Government, created a factual question as to Rylander's ability to comply with the January 15 order.

The Government tried to prove that Rylander was able to produce the documents by showing that he had previously been the principal officer of the two corporations. The Government's evidence showed that Rylander had been president of the two corporations between 1972 and 1977. It also showed that he had performed various acts on behalf of the corporation prior to 1980. There was no direct evidence that the documents sought were in existence and in Rylander's possession or control on or after January 15, 1980.

Rylander's status as a former corporate officer, particularly in light of his claim that he did not possess or

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[2] This evidence does not include Rylander's "Oath in Purgation of Contempt," which was filed after Rylander had been sentenced. This document was not part of the record upon which the district court based its judgment.

control the documents, is not sufficient to establish beyond a reasonable doubt his ability to produce the summoned documents in January 1980. The inferences that may arise from his past relationship with the corporation are simply not strong enough on the facts of this case to establish beyond a reasonable doubt an ability to comply with the court's order. Accordingly, we hold that there was not sufficient evidence to convict Rylander of criminal contempt for his failure to produce the summoned documents.

B. Failure to Appear

Rylander's second criminal contempt conviction results from his failure to appear at the March 24, 1980 show cause hearing. Following Rylander's failure to comply with the district court's January 15, 1980 order to produce the summoned documents, the district court ordered him to appear on March 24, 1980, and show cause why he should not be held in contempt. When the United States Marshal's repeated efforts to personally serve the order on Rylander were unsuccessful, the order was served by mail pursuant to Rule 5(b) of the Federal Rules of Civil Procedure. Rylander did not appear at the March 24 hearing, but his son filed a three-page statement dictated by Rylander over the telephone from Oregon.

As we have previously discussed, knowledge or notice of the court order in question and a willful disobedience of that order are the essential elements of criminal contempt. *United States* v. *Powers*, 629 F.2d at 627. Disobeying an order to appear at a show cause hearing, like disobedience to any other court order, can result in a criminal contempt conviction. *See Douglass* v. *First National Realty Corp.*, 543 F.2d 894, 897 (D.C. Cir. 1976). Contrary to Rylander's assertion that he could not be held in contempt because he was not personally served with the order, actual knowledge of the order is all that is required; neither formal notice nor personal

service is necessary to support a conviction for criminal contempt. *United States* v. *Baker*, 641 F.2d 1311, 1316-17 (9th Cir. 1981).

Rylander concedes that his March 23, 1980 letter to the court requesting a continuance is proof of his actual knowledge of the order to appear on the following day. He asserts, however, that the letter indicated his good faith willingness to comply with the court order. The inquiry, therefore, is whether he acted willfully in failing to appear on March 24.

There is sufficient evidence in the record to support the district court's conclusion that Rylander's failure to appear was willful. While a good faith effort to comply with the order is a defense to a charge of contempt, "delaying tactics or indifference to the order are not." *United States* v. *Baker*, 641 F.2d at 1317. The record is replete with evidence of Rylander's disregard for the court's attempts to enforce its orders. Despite at least six attempts to personally serve him with show cause orders and repeated service by mail and publication, Rylander never appeared before the district court. It is undisputed that Rylander was aware of the March 24 show cause hearing. His failure to appear at any time after that date belies his contention that he had a good faith willingness to comply. Indeed, the district judge was required to issue a bench warrant to obtain Rylander's presence before the court.

We conclude that the evidence was sufficient to convict Rylander of contempt for his failure to appear at the March 24 hearing.

IV
PROCEDURAL ISSUES

Because we have concluded that there was insufficient evidence to support the contempt conviction for failure to produce the summoned documents, and a retrial on that charge is therefore barred, we discuss the other grounds for relief urged by Rylander only in

relation to his conviction for failure to appear at the March 24 show cause hearing.

A. Combining Criminal and Civil Contempt Trials

Rylander argues that the district court improperly combined his trials on the civil and criminal contempt charges. Jointly trying civil and criminal contempt charges is not a ground for reversal unless it is "shown to result in substantial prejudice." *United States* v. *United Mine Workers*, 330 U.S. at 299-300. Rylander has failed to demonstrate such prejudice. None of the safeguards to which he was entitled as a criminal defendant was compromised. We therefore do not reverse on this ground.

Although combining the civil and criminal trials in this case was not reversible error, such joint trials entail problems and hazards that lead us to think it would usually be wiser to try the civil and criminal charges separately. There are many safeguards applicable in a criminal contempt proceeding, such as the right to a jury trial in some cases, the right to counsel, the right not to take the witness stand, and the "beyond a reasonable doubt" burden of proof, which do not apply in a civil contempt proceeding. These differences create unforeseen problems when civil and criminal contempt charges are tried jointly. Thus, although it was not reversible error here, we do not endorse the practice of trying civil and criminal contempt charges jointly.

B. Recusal

The district court properly rejected Rylander's request for recusal pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 144. The contempt charges did not involve criticism of the trial judge as required for recusal under Rule 42(b). Rylander's pretrial affidavits contain no "specific fact allegations tending to show personal bias stemming from an extrajudicial source," as required by 28 U.S.C.

§ 144. *United States* v. *Sibla*, 624 F.2d 864, 868 (9th Cir. 1980). The record indicates that the district judge conducted these proceedings in a fair and impartial manner. Indeed, he showed unusual patience and tolerance.

C. Notice of the Charge

Rylander contends that the notice of the contempt charge for failure to appear did not comply with Rule 42(b) of the Federal Rules of Criminal Procedure. Rule 42(b) requires that the notice "state the essential facts constituting the criminal contempt charged and describe it as such." The "simple notice" required by Rule 42(b) is less rigid than the requirements for a formal indictment or information, but it must still apprise the defendant of the basis for the contempt charge. *United States* v. *Robinson*, 449 F.2d 925, 930 (9th Cir. 1971). Although the notice need not contain the word "criminal," there must be some indication that the defendant is aware that a criminal contempt is charged. *United States* v. *United Mine Workers*, 330 U.S. at 297.

The clearest notice of the charge against Rylander was contained in the Government's pretrial brief, filed nine days before trial, which explicitly argued that he should be found guilty of criminal contempt for his failure to appear on March 24. Somewhat less clear was the show cause order, which initiated the contempt proceeding and inquired as to why Rylander should not be held in "criminal contempt of court and punished therefor." That order referred to the Government's petition, which, in its recitation of why Rylander should be ordered to show cause why he should not be held in contempt, included a statement of his failure to appear at the March 24 hearing in violation of the district court's order.

Regardless of whether the show cause order and the Government's petition, standing alone, constituted sufficient notice, the Government's pretrial brief suffi-

ciently apprised Rylander of the charges to meet the requirements of Rule 42(b). *See United States* v. *Robinson*, 449 F.2d at 930.

D. Right to Counsel

Rylander argues that he was denied his sixth amendment right to counsel in the district court. The district court appointed an attorney to represent Rylander and, after Rylander discharged the attorney, appointed a second attorney, who was also subsequently discharged by Rylander. Rylander then requested that the district court appoint an attorney of Rylander's choosing. Instead, the district court gave Rylander the choice of being represented by one of the two lawyers who had previously been appointed, hiring counsel himself, or representing himself. Rylander chose to represent himself, and was permitted to do so after the district court found that he had "knowingly, intelligently, and competently waived counsel."

Although a criminal defendant has a right to represent himself, *Faretta* v. *California*, 422 U.S. 806, 807 (1975), the decision to do so must be made knowingly and intelligently. *United States* v. *Harris*, 683 F.2d 322, 324 (9th Cir. 1982). "Before waiving his right to counsel, the defendant must be aware of the nature of the charges and the possible penalties, as well as the dangers and disadvantages of self-representation in a complex area where experience and professional training are most helpful." *Id.* The preferred procedure is for the district judge to ensure that a waiver is made knowingly and intelligently by discussing with the defendant, on the record, the nature of the charges, the possible penalties, and the dangers of self-representation. *Id.* It is an unusual case where, absent such a colloquy, a knowing and intelligent waiver of counsel will be found. *Id.*

Although the district judge exhibited great patience with Rylander on the matter of Rylander's representa-

tion, he neglected to discuss with Rylander the nature of the charges and the possible penalties prior to accepting the waiver of counsel. Furthermore, the record does not indicate that Rylander understood the nature of the charges or the possible penalties at the time he waived counsel. In numerous documents filed in the district court, Rylander claimed not to understand the charges against him. It may well not have been clear to a lay person from the Government's petition and the orders to show cause that Rylander's failure to appear March 24 would be the basis for a contempt charge. It is quite possible that this was not clear to Rylander until the Government filed its pretrial brief, after Rylander had waived counsel. There is also no indication in the record that Rylander understood the possible penalties at the time he waived counsel. The district judge did not discuss the penalties that might be imposed until he took up the motion for a jury trial, after Rylander's waiver of counsel.

Because the record does not indicate that Rylander understood the nature of the charges or the possible penalties at the time he waived counsel, we reverse the conviction and remand for a new trial.

E. Jury Trial

Finally, Rylander argues that he had a constitutional right to a jury trial which was abridged in the district court.

There is a sixth amendment right to a trial by jury in serious, but not petty, criminal contempt cases. *Bloom* v. *Illinois*, 391 U.S. 194, 198 (1968). Whether a criminal contempt is serious or petty is determined by the severity of the penalty authorized. *Frank* v. *United States*, 395 U.S. 147, 149 (1969). If the contempt is charged under a statute that authorizes a maximum penalty greater than $500 or six months' imprisonment, there is a right to a jury trial regardless of the penalty actually imposed. *Muniz* v. *Hoffman*, 422 U.S. 454,

476-77 (1975). Absent a specific statutory authorization of a maximum penalty, the severity of the penalty actually imposed determines whether the contempt was serious or petty. *Frank* v. *United States*, 395 U.S. at 149. Where no maximum penalty is specified, a contemnor may be sentenced to up to six months' imprisonment and fined as much as $500 without a jury trial. *Id.* at 150; *United States* v. *Hamdan*, 552 F.2d 276, 280 (9th Cir. 1977).

The two contempt charges in this case were tried jointly. The contempt charge for failing to produce the summoned documents arose from Rylander's refusal to comply with a summons issued pursuant to 26 U.S.C. § 7602. Punishment for disobedience to a section 7602 summons is specifically controlled by 26 U.S.C. §§ 7604(b) and 7210, which authorize a maximum penalty of $1,000 or one year of imprisonment or both. Thus, any criminal contempt charged as a result of disobedience to a section 7602 summons is a serious offense and carries with it the right to a jury trial. Rylander's request for a jury trial therefore should have been granted.

If Rylander had been tried only on the second contempt charge, he would not have had a right to a jury trial. That charge, for failure to appear on March 24, was brought under 18 U.S.C. § 401(3).[3] That statute does not specify a maximum penalty. There was therefore no right to a jury trial because he was neither sentenced to more than six months' imprisonment nor fined more than $500.

Because we reverse Rylander's contempt conviction for failure to appear on another ground, we do not reach the question of whether, because that charge was

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[3] Unlike the charge for failing to produce the summoned documents, this charge could not have been brought under 26 U.S.C. § 7604(b), because that section only authorizes punishment for disobedience to the requirements of summonses.

tried jointly with the failure to produce charge, the failure to afford him a jury trial would require reversal. On remand, since he cannot be retried on the failure to produce charge, Rylander will not be entitled to a jury trial so long as he is not sentenced to more than six months' imprisonment or fined more than $500.

V
CONCLUSION

We reverse Rylander's contempt conviction for failure to produce because the evidence was insufficient. We reverse the contempt conviction for failure to appear because Rylander's sixth amendment right to counsel was violated. The case is remanded for further proceedings on the failure to appear contempt charge.

REVERSED and REMANDED.

United States v. *Rylander*, Nos. 80-1813, 80-1702 and 80-1703

POOLE, Circuit Judge, dissenting.

This case is a conspicuous illustration of the capacity of a determined individual literally to thumb his nose at a district court and later escape being called to account because judges are unable to avoid tripping over themselves with legal technicalities. Try as I have, I simply cannot agree that this defendant, whose history of utter defiance of legal process and court orders, is spread across a clear record, is again to be bailed out on the grounds that he did not act knowingly and intelligently when he rejected two court appointed lawyers, tried to insist that a personally-known lawyer be appointed at public expense and, denied that luxury, elected to represent himself. In an earlier phase of this same case the defendant became the beneficiary of judicial technicality when this circuit reversed the trial court's adjudication of civil contempt. *United States* v. *Rylander*, 656 F.2d 1313 (9th Cir. 1981) (*Rylander I*). The Supreme Court overruled and reversed us and reinstated the judgment. *United States* v. *Rylander*, 103 S.Ct. 1548 (1983) (*Rylander II*). We are about to reward him again.

I can agree that Rylander was not shown sufficiently to have actually had possession of the disputed corporate records during the critical period although he was the president of the corporation. The presumption that because he directed the corporation he personally had possession of the records, is inadequate.

But on March 24, he deliberately failed to appear in response to the court's order to show cause. He was tried on that charge and the majority concludes that he had notice of both the duty to appear, the nature of the proceeding scheduled, and the ability to have appeared. When he was finally brought in involuntarily, the court

proceeded to hear an ordinary contempt case. The judge appointed a lawyer to represent the defendant. Rylander discharged him. The judge appointed a second lawyer to defend him. Rylander discharged that lawyer. Clearly, Rylander could keep up that act indefinitely and as clearly, might be able indefinitely to fend off any trial. The judge then gave him his option: take either of the first two lawyers or go it alone.

Rylander went it alone and was convicted. For two reasons, both of which I believe are wrong, the majority has set aside this conviction. First the majority says that the court did not explain to Rylander the pitfalls of being his own counsel. It cites cases such as *United States* v. *Harris*, 683 F.2d 322 (9th Cir. 1982) as its authority. The facts in *Harris* are vastly different. Harris was tried under 26 U.S.C. § 7203 for failing to file income tax returns for three years. It was a jury trial and he represented himself. He knew of his right to counsel but twice stated that he wished to represent himself. He did not know anything about a jury trial, nothing about challenges, nothing about cross-examination and making objections. The *Harris* opinion states that his "opening" statement was largely a rather meaningless objection to the law and proceedings. A § 7203 charge has many elements calling for learning and skill in presentation. An untutored layman is not generally equipped to handle the intricacies of a jury trial, and especially not in a criminal tax case.

But the only similarity to this case is that Rylander had refused to appear when ordered by the court in a proceeding which was merely ancillary to a tax trial. Since he was notified to appear and there is no reason shown why he did not appear, his case would seem well described by the language in *Harris* that

> "this court has, however, held that a failure [of the district court to describe all the elements of waiver] will not, in every case, necessitate reversal."

Whatever defense Rylander chose to offer, he had to have a valid reason for not appearing when he knew he should. Rylander presented no excuse and took no part in the proceedings except his effort to disqualify the trial judge. His adamant refusal to comply with any order of the court was part of a pattern. I find it difficult to comprehend how we expect obedience to valid court orders if we tolerate willful and sustained contumacy. Rylander is shown as a crafty and deliberate person. The rejection of counsel by this corporation president cannot be called the decision of a novice. That principle is intended to protect the unwary, not to ratify deliberate disobedience to a simple and uncomplicated order to come to court at a certain time.

JURY TRIAL

The majority holds that Rylander was entitled to a jury trial because that the contempt charge arose from his refusal to comply with a summons issued by the Internal Revenue Service pursuant to 26 U.S.C. § 7602. The majority reasons that disobedience to § 7602 is punished under § 7604(b) and § 7210, authorizing a misdemeanor penalty of as much as $1,000 or a year's imprisonment, or both. Therefore, says the majority, "any criminal contempt charged as a result of disobedience to a § 7602 summons is a serious offense and carries with it the right to a jury trial." (Op. p. 16). The majority is confused. He was not in contempt for disobeying a summons but for disobeying a court order.

The Internal Revenue code sections make it a crime to disobey a summons. Congress has established procedures to compel compliance with IRS' summons to appear before that agency and produce records and/or give testimony. There are defenses to that requirement. *See United States* v. *Rylander*, 103 U.S. 1548 (1983) (passim), which can be asserted in the agency proceedings or in any court proceedings convened for the purpose of enforcing the obligation. But when a

court issues an order or other process to a person for the purpose of bringing him into court where his defenses or mitigation may be heard, the court is invoking its judicial power, and even if the entire world knows that the defendant has a perfect and complete defense to the summons itself, he still must come. If he refuses, it is not merely a disappointment to the agency's mission, it is disobedience to valid court process. This, as I thought no one disputed, is a plain act of contempt under 18 U.S.C. § 401, and is initiated by the court on motion, or *sua sponte*, under Rule 42, Fed. R. Crim. P., or on application of the United States Attorney or an attorney appointed by the court for that purpose. In such a proceeding, the agency has no standing except as the court may direct, for the purpose is not remedial for the agency's benefit, but punitive to vindicate the court's own dignity.

The district court here denied Rylander a jury trial on such authorities as *Muniz* v. *Hoffman*, 422 U.S. 454 (1975). In its view, however outrageous Rylander might be in refusing to respond to the *court's* process, he still was liable to punishment only under the tax statutes. This is at odds with both logic and policy. The district court advised Rylander that he would be subject only to a fine of $500 or six months confinement, or both. That is the limit of a petty offense. Petty offenses do not carry the right to jury trial. Rylander's sentence was within those bounds. I dissent from the majority's reversal and its awarding him a jury trial.

Finally, although it may be only advisory dictum and district judges may wish to accept the advice with caution and reservations, I do not associate with the majority's teaching that it is bad practice to combine civil and criminal contempt hearings. Combined hearings are common in district court contempt cases, of which many arise in the course of labor case injunctions. Because they involve almost the identical evidence, and, espe-

cially in labor cases, because of the need to bring a speedy end to labor disputes, it would be burdensome on the parties and expensive charges against judicial resources to require two trials with the same evidence and witnesses. The majority supplies no empirical basis for its announced preference and therefore I would belabor it no further.

Rylander has once again, as the Supreme Court said in reinstating his civil contempt adjudication, played "a game of hare and hounds." *Rylander I*, 103 S.Ct. at 1555 (quoting from *United States* v. *Bryan*, 339 U.S. 323, 331). It is now time for an end.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed: November 3, 1983

No. 80-1813, 80-1702, 80-1703
CR S-80-44-LKK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RICK W. (DICK) RYLANDER, SR., ET AL.,
DEFENDANT-APELLANT.

APPEAL from the United States District Court for the EASTERN District of CALIFORNIA (SACRAMENTO) _____

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the EASTERN District of CALIFORNIA (SACRAMENTO) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED AND REMANDED.

Filed and entered September 2, 1983

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Criminal No. S-80-44-LK

Associated Cases:
S-79-570-LKK
S-79-571-LKK

UNITED STATES OF AMERICA, PLAINTIFF

v.

RICHARD W. (DICK) RYLANDER, SR., DEFENDANT

Filed Oct. 24, 1980

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER RE CIVIL CONTEMPT

This cause came on for court trial on October 8, 1980, pursuant to a petition by the United States Attorney for an order to show cause why defendant should not be held in contempt and the order to show cause. This Court has heard the testimony and examined the proofs offered by the plaintiff United States. Defendant neither filed an Answer to the petition, nor offered any evidence at trial, but entered *in propria persona*, a continuing objection to the proceedings on various grounds, including lack of jurisdiction. This Court, having rendered on October 8, 1980 a decision in favor of the plaintiff, hereby adopts its Findings of Fact and Conclusions of Law as follows:

IT IS TRUE THAT:

1. Upon the petition of the United States and the exhibits attached thereto, this Court on November 20, 1979 ordered Rylander & Company Realtors, Inc., Affiliated Investments & Mortgage Company, dba AIM Real Estate Marketing and Counseling and Richard W. (Dick) Rylander, Sr. (hereafter Defendant), as presi-

dent of subject corporations, to show cause why they should not be compelled to testify and to produce the records demanded in the Internal Revenue Service summonses served upon them on January 4, 1979 by Joan M. Van Den Berg, IRS Special Agent. *United States of America, Joan M. Van Den Berg, Special Agent*, v. *Rylander & Co., Realtors, Inc., and Richard W. Rylander, Sr., President, Rylander & Co. Realtors, Inc.*, Civil No. S-79-570, and *United States of America, Joan M. Van Den Berg, Special Agent* v. *Affiliated Investments & Mortgage Company, et al.*, Civil No. S-79-571. Hearing on these Orders to Show Cause was set for 10:00 a.m. on January 14, 1980.

2. Defendant was personally served with the petitions and Orders to Show Cause on November 30, 1979.

3. Defendant returned the Orders to Show Cause and supporting pleadings to the U.S. Marshal with a letter addressed to the deputy marshal and a copy to the Clerk of the District Court, claiming that Defendant was not the president of the subject corporations and therefore had been improperly served. Defendant filed no other written response to the Orders to Show Cause nor did he or other corporate representatives appear at the scheduled January 14 hearing. Following an offer of proof by the petitioner, oral testimony and argument, this Court issued written Orders Enforcing the Summonses on January 15, 1980. The Orders required the Defendant to appear on Monday, February 4, 1980 at 10:00 a.m., before Joan Van Den Berg, or other person designated by the United States, at the IRS office in Sacramento, California, and produce the records and documents (with certain exceptions not here pertinent) of Rylander & Co. Realtors, Inc. and Affiliated Investments & Mortgage Co., as requested by the IRS summonses.

4. Defendant was personally served with the Orders Enforcing Summonses on January 27, 1980. No appeal

was taken from said Orders by Defendant, a person knowledgeable in taking and perfecting appeals from judicial orders enforcing IRS summonses.

5. Defendant appeared at the IRS office in Sacramento on February 4, 1980; did not produce any corporate books or records; claimed he did not possess them; and declined to answer any questions regarding the records' whereabouts.

6. On ensuing petitions by the United States to enforce this Court's Order on January 15, 1980, this Court issued Orders to Show Cause why defendant should not be held in contempt on February 11, 1980; February 25, 1980; March 28, 1980 and April 23, 1980. Efforts by the U.S Marshal to serve these personally on Defendant were unsuccessful. Repeated service by mail and by publication failed to elicit any appearance by Defendant at Order to Show Cause hearings on March 10, 1980; March 24, 1980; April 15, 1980 and May 27, 1980. A bench warrant issued by this Court on May 27, 1980 resulted in Defendant's arrest on July 11, 1980. He has been free on bail since July 14, 1980.

7. At all times pertinent here, subject entities, Rylander and Co. Realtors, Inc. and Affiliated Investment and Mortgage, were corporations duly incorporated under the laws of the State of California. [Defendant, as president or other corporate officer, had possession or control, or both, of the books and records of said corporations.]

8. The corporate books and records which are the subject of this Court's Order of January 15, 1980 remain relevant to the IRS investigation into the tax liability of defendant. This investigation is still under way. The IRS does not presently possess said corporate books and records.

From the foregoing facts, this Court concludes:

CONCLUSIONS OF LAW

1. That the Court has jurisdiction of the subject contempt proceeding and the parties. This Court has inherent civil contempt power. *United States* v. *Asay*, 614 F.2d 655, 659 (9th Cir. 1980); 28 USC § 1651(a); Rule 70 of the Federal Rules of Civil Procedure. In addition, where a person refuses to comply with a Court's Order enforcing an IRS Summons, this Court is specifically authorized to secure compliance with its orders by adjudicating the person in civil contempt. (26 USC § 7604(b)); *United States* v. *Wodtke*, 543 F.2d 43, 44 (8th Cir. 1976).

2. That defendant's refusal, unless inadvertent or for other innocent reason, to obey this Court's Order of January 15, 1980 enforcing the IRS Summonses constituted civil contempt of this Court. *United States* v. *Asay, supra.*; *United States* v. *Peter*, 479 F.2d 147 (6th Cir. 1973); *United States* v. *Secor*,, 476 F.2d 766 (2d Cir. 1973); *United States* v. *Wodtke, supra.; United States* v. *Hankins*, 565 F.2d 1344, 1351-1352, and 581 F.2d 431, 437 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979).

3. That the burden of proof was on the defendant to show "categorically and in detail" why he failed to or was unable to comply with the Court's order. *NLRB* v. *Trans Ocean Export Packing*, 473 F.2d 612, 616 (9th Cir. 1973). *Cf. McPhaul* v. *United States*, 364 U.S. 372, 378-379 (1960). In failing to introduce any evidence at the contempt trial, Defendant has failed to show cause why he should not be held in civil contempt of Court.

4. That this Court's Order of January 15, 1980 became final and appealable when it was entered on January 16, 1980. *United States* v. *Asay, supra.* at pp. 659-660. The Order contained a specific finding of *in personam* jurisdiction. Defendant, with actual notice of the January 15, 1980 Order, failed to appeal. Thus, de-

fendant is barred under the doctrine of res judicata from collaterally attacking the legal or factual basis of the Order in a subsequent contempt proceeding. *Daly* v. *United States*, 393 F.2d 873, 876 (8th Cir., 1968); *United States* v. *Asay*, *supra*, *United States* v. *Secor*, *supra*; *United States* v. *Peter*, *supra*. As Mr. Justice Jackson has stated:

> "...when (the Order) has become final, disobedience cannot be justified by re-trying the issues as to whether the Order should have been issued in the first place." *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948)

In any event, this Court had *in personam* jurisdiction by virtue of personal service of the Petitions to Enforce Summonses and Orders to Show Cause on defendant on November 20, 1979. *Daly* v. *United States*, *supra*, at p 875.

5. That defendant could not unilaterally oust this Court of jurisdiction by returning the Order to Show Cause to the United States Marshal, and refusing to file a responsive pleading or to appear at this Court's January 14, 1980 hearing on the Order to Show Cause. The government, by way of petition, affidavit and oral testimony of the agent who issued the summons, made the showing required to establish a prima facie case for enforcement of the summonses under *United States* v. *Powell*, 379 U.S. 48 (1964) and *United States* v. *Church of Scientology of California*, 520 F.2d 818 (9th Cir. 1975). As no challenges were raised to that showing, the summonses should have been, and correctly were, ordered enforced. *United States* v. *Garden States Bank*, 607 F.2d 61, 70 (C.A. 3, 1979); *United States* v. *Stuart*, 587 F.2d 929, 930-931 (C.A. 8, 1978); *United States* v. *Newman*, 441 F.2d 165, 169 (C.A. 5, 1971). Furthermore, the evidence fully establishes that the Order to Show Cause, as well as the underlying IRS summonses, were directed to defendant as a prop-

er party. *United States* v. *Lucas General Contractors, Inc.*, 406 F. Supp. 1267, 1276-77 (D.S. Caro., 1975); *United States* v. *American Standard Remodeling Corp.*, 252 F. Supp. 690 (W.D. Pa. 1966).

6. That it is the responsibility of this Court to provide a fair, effective, and orderly judicial process. *United States* v. *Asay*, *supra*, at p. 659. If defendant had legitimate reasons for failing to comply with the IRS Summonses, a minimum respect for the processes of this Court requires that defendant, once served, state his reasons for noncompliance in response to this Court's initial Order to Show Cause. *Cf. United States* v. *Bryan*, 339 U.S. 323, 332-333 (1950). For at the time and place specified in said order, this Court presented itself for the taking of testimony and hearing of argument. Defendant,in eschewing any participation in the Court proceedings, treated the Order to Show Cause as an "invitation to a game of hare and hounds" in which the respondent must produce the documents "only if cornered at the end of the chase." *United States* v. *Bryan*, *supra*. at p. 331. Such a strategy, as the decision in *Bryan* forewarns, is not without its risks.

7. That the Court acted within its discretion in the adjudication of both the civil and contempt charges in a consolidated action since they arise out of the same transaction or series of transactions. *United States* v. *United Mine Workers*, 330 U.S. 258, 398-300 (1947); *Mitchell* v. *Fiore*, 470 F.2d 1149, 1153 (3d Cir.1972), *cert. denied*, 411 U.S. 938 (1973). In any event, the proceedings followed the procedures applicable to criminal contempt adjudications set forth in Fed. R. Crim. p. 42(b).

ORDER

ACCORDINGLY, IT IS ORDERED AND ADJUDGED, that Richard W. (Dick) Rylander is guilty of civil contempt;

IT IS FURTHER ORDERED that the matter of appropriate compensatory and compulsory relief is hereby continued to October 23, 1980 at 1:30 P.M.

DATED: OCTOBER 23, 1980.

/S/ LAWRENCE K. KARLTON
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

At a stated term of the United States District Court of the Eastern District of California, held at the Courtroom thereof, in the City of Sacramento, on October 8, 1980.

PRESENT: The Honorable LAWRENCE K. KARLTON, U.S. District Judge

Cr. S-80-44-LKK
(Civ. S-79-570-LKK)
(Civ. S-79-571-LKK)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

RICHARD W. (DICK) RYLANDER, DEFENDANT.

The above-captioned matter came on for court trial. The Court now finds as follows:

1. Relative to the charges of criminal contempt the defendant is guilty of failure to produce documents pursuant to the order of this Court enforcing the administrative summons;

2. The defendant is not guilty of avoiding process to appear at the February 22, 1980, hearing;

3. The defendant is guilty of failing to appear at the March 24, 1980, hearing.

The Court now orders a pre-sentence report for those matters upon which the defendant was found guilty. As previously ordered, punishment for guilt as to those charges will be limited to punishment applicable to pet-

ty offenses (i.e. not more than six months or $500.00 on each count).

The Court further orders judgment and sentencing set for November 18, 1980, at 9:30 a.m.

Further, the Court finds that the defendant, Richard W. (Dick) Rylander, guilty of civil contempt and orders him remanded to the custody of the Attorney General unless and until he purges himself of the civil contempt charge by either:

1. Complying with the Court Order to produce the documents; or

2. Testifies why he cannot produce the documents.

Upon the defendant's indicating his willingness to testify as to why he cannot produce the documents, the Order remanding the defendant to the custody of the Attorney General is vacated. Upon the defendant's indication of his desire to have the Federal Defender appointed to repesent the defendant concerning possible Fifth Amendment claims the Federal Defender is conditionally appointed pursuant to the order heretofore issued by the Court concerning appointment of counsel.

A hearing on the purging motion is now continued to October 9, 1980, at 10:00 a.m. Defendant is ordered to be personally present at that time, and is permitted to remain on bail.

I HEREBY CERTIFY that the foregoing is a true and correct statement of the order made in the above entitled case.

J. R. GRINDSTAFF, *Clerk*
By: Sharon Jaggard
SHARON JAGGARD
Courtroom Clerk

Dated: OCTOBER 8, 1980

cc hand delivered to:
AUSA S. Robinson
Mr. Richard W. (Dick) Rylander
U. S. Probation.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NOVEMBER 19, 1980

Cr. S-80-44

UNITED STATES OF AMERICA

v.

RICHARD W. (DICK) RYLANDER, SR.

In the presence of the attorney for the government the defendant appeared in person on this date: November 19, 1980.

X WITHOUT COUNSEL. However the court advised defendant of right to counsel and asked whether defendant desired have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

There being a finding/verdict of: GUILTY

Defendant has been convicted as charged of the offense(s) of two counts of criminal contempt.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered: The defendant hereby committed to the custody of the Attorney General or his authorized representative for Imprisonment for a period of SIX (6) MONTHS in a jail-type institution as to the first count of criminal contempt.

IT IS FURTHER ORDERED that the defendant is to serve SIX (6) MONTHS in a jail-type institution as to the second count of criminal contempt of which the

defendant was convicted, which shall run concurrent with the sentence imposed in the first count.

IT IS FURTHER ORDERED that sentence is to commence upon the termination of incarceration resulting by virtue of the defendant's failure to purge himself of civil contempt under the Court's order in Civil No. S-79-570 and S-79-571.

IT IS FURTHER ORDERED that if by virtue of appeal or writ this Court's Order remanding the defendant to the custody of the United States Marshal in the civil cases is erroneous, then upon any such order so finding becoming final, service of the sentence herein imposed shall commence forthwith.

In addition to the special conditions of probation above, it is hereby ordered that the general conditions of probation set out on reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and reverse probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends _____

/s/ Lawrence K. Karlton

LAWRENCE K. KARLTON
U.S. District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil No. S-79-570-LKK

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

RYLANDER & CO., REALTORS, INC., ET AL.,
RESPONDENTS

Filed Jan. 16, 1980

ORDER ENFORCING SUMMONS

The above related summons enforcement proceedings came on for hearing on January 14, 1980, upon previously issued Orders to Show Cause of this Court. Solomon E. Robinson, Assistant United States Attorney, appeared on behalf of Petitioners; no appearance was made by or on behalf of Respondents.

The Court heard an offer of proof and oral testimony and argument on the issues of (1) personal jurisdiction over the respondent corporations and (2) IRS possession of records requested in the summonses. Upon consideration of the foregoing, as well as the Declarations filed by Respondent Rylander, the verified petitions of Petitioner Van Den Berg, and the remaining records of these proceedings, the Court finds that it does have jurisdiction over the Respondents, and it is therefore hereby

ORDERED that Richard (Dick) Rylander, Sr. shall appear on Monday, February 4, 1980 at 10:00 a.m. before Joan Van Den Berg, or other person designated by Petitioner, at the office of the Internal Revenue Service

at 801 I Street, Room 292, Sacramento, California, and then and there produce for Petitioner's inspection and copying the records described in the IRS summonses attached hereto as Exhibits A and B, except the following records described in Exhibit A:

1. Corporate books and records including cash receipts and cash disbursements, journals and ledgers; for the period of January 1, 1975 to March 31, 1975 for RYLANDER & CO. REALTORS, INC.

2. Payroll records of corporate officers, directors, employees and sub-contract labor including payment to real estate agents, secretarial help, etc. Form W-2's, Wage and Tax Statements; Form 1099's, Miscellaneous Income Statement; Form 941, Quarterly Statement of Employee's Earnings; and Form 940, Annual Unemployment Tax Return for the period of January 1, 1975 to March 31, 1975.

3. Check record of RYLANDER & CO. REALTORS, INC. including deposit slips, record showing source of deposits, bank statements, checks and check record showing purpose of checks issued for the period of January 1, 1975 to March 31, 1975.

ORDERED, this 15th day of January, 1980, at Sacramento, California.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
United States District Court Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NO. CRIM. S-80-44 LKK
(Civil S-79-570)
(Civil S-79-571)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

RICHARD W. (DICK) RYLANDER, SR. DEFENDANT

The defendant is charged with civil contempt, pursuant to 28 U.S.C. § 1651(a), for failure to comply with this Court's order of January 15, 1980, enforcing Internal Revenue Service administrative summonses. The defendant is also charged with criminal contempt pursuant to 18 U.S.C. § 401(3). This charge arises from the defendant's refusal to appear, despite notice, at judicial proceedings requiring him to show cause why he should not be held in contempt for failure to comply with the January 15, 1980, order.

The defendant has requested a jury trial on the issues of contempt, asserting that a right to a jury trial should exist in both the civil and criminal contempt contexts.

Due to the conditional nature of civil contempt confinement, as a matter of law a jury trial is not constitutionally required in such proceedings. *Shillitani* v. *United States*, 384 U.S. 364 (1966).

Whether a defendant is entitled to a jury trial in a criminal contempt proceeding is dependent upon the characterization of the contempt as "*petty*" or "serious." If it is petty no such right exists. To determine the seriousness of the offense the court must look to the maximum penalty prescribed by law or, if none is pro-

vided, the penalty actually imposed. *Muniz* v. *Hoffman*, 422 U.S. 454 (1975). Where a sentence of up to six months imprisonment and/or at least $500 is imposed the criminal contempt is deemed *petty* and a jury trial is not required. *Muniz* v. *Hoffman*, *supra*. at 476-77. If the defendant in the present case were found guilty of criminal contempt the sentence imposed would *not* exceed the limits noted above.

Finally, this case falls within the exception to 18 U.S.C. § 3691. *See*, *Frank* v. *United States*, 395 U.S. 147, 149 n.1 (1969). Accordingly, it is ordered that the defendant's request for a jury trial is denied.

IT IS SO ORDERED.

DATED: September 24, 1980

/s/ _____

LAWRENCE K. KARLTON
U.S. District Judge

Supreme Court, U.S.
FILED
JAN 9 1984
ALEXANDER L. STEVAS
CLERK

No. 83-906

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JAN 20 PAGE 44

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD W. (DICK) RYLANDER, SR.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH F. HARBISON, III
OF THE FIRM OF
MATHENY, POIDMORE & SEARS
Counsel of Record

TIMOTHY P. MURPHY,
Attorney

MATHENY, POIDMORE & SEARS
A Professional Corporation
2100 Northrop Avenue
P.O. Box 13711
Sacramento, CA 95853-9990
Tele: 916 929-9271

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-906

UNITED STATES OF AMERICA, PETITIONER

V.

RICHARD W. (DICK) RYLANDER, SR., RESPONDENT

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

Petitioner, RICHARD W. RYLANDER, SR., pursuant to Rule 46 and 18 U.S.C. §3006A(d)(6), asks leave to file the attached Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs, and to proceed in forma pauperis. Petitioner was represented by appointed counsel, JOSEPH F. HARBISON, III, in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

JOSEPH F. HARBISON, III, as a member of the Federal Defenders Panel for the Eastern District, represented petitioner in the Federal District Court action No. CR-S-80-44 LKK (criminal contempt) which corresponds to the Ninth Circuit Docket Nos.

80-1813, 80-1702, and 80-1703. The 9th Circuit decision in that case is the subject of the Solicitor General's petition to this Court for a Writ of Certiorari, Case No. 83-906. Further, petitioner was represented by the same attorney, myself, in District Court Case No. CS-79-570 and CS-79-571 (civil contempt) which corresponded to the 9th Circuit Docket Nos. 80-4594 and 80-4595 which resulted in the previous United States Supreme Court Case No. 81-1120, decided by this Court on April 19, 1983. Petitioner proceeded in forma pauperis on that appeal by previous District Court Orders, and appointment by the United States Supreme Court.

DATED: January 4, 1984

Respectfully submitted,

MATHENY, POIDMORE & SEARS

By: _____
JOSEPH F. HARBISON, III
P.O. Box 13711
Sacramento, CA 95853-9990

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9980

TABLE OF CONTENTS

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

TABLE OF AUTHORITIES

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

SUMMARY OF ARGUMENT

Respondent contends that the petition for a Writ of Certiorari in this matter should be denied because: 1) a conviction of criminal contempt will only lie where the alleged contemnor has willfully and contumaciously refused to comply with the underlying order. Since the contemnor's ability to comply is an essential element of the offense which must be proven beyond a reasonable doubt, the prosecution must prove he had the ability to comply at the time specified in the order. In this case, the prosecution failed to prove that fact beyond a reasonable doubt at the time of trial; 2) the government cannot skirt this proof requirement by making reference to a prior proceeding where the issue was neither raised nor proven; 3) there is no indication in the record that respondent was informed of the nature of the charges and possible penalties, nor made a knowing and intelligent waiver of the right to counsel. Therefore, if petitioner's view is followed, the entire basis on which the freedoms of this society are based would be reversed in that a defendant charged with a crime would have the burden of proving his innocence as opposed to the prosecution carrying the burden to prove his guilt beyond a reasonable doubt.

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

STATEMENT OF THE CASE

On January 4, 1979, the Internal Revenue Service (IRS) issued administrative summonses directing respondent, in his capacity as a corporate officer to appear, produce documents, and testify regarding the tax liability of two corporations. Respondent did not comply and the IRS sought court enforcement.

The District Court issued orders on November 19 & 20, 1979 directing respondent to appear before the court on January 14, 1980 and show cause why the summonses should not be enforced. Respondent did not appear at the hearing, but returned the orders to the court with a letter explaining that he was not an officer of the corporation.

The court heard the government's offer of proof on the issues of personal jurisdiction and whether the documents were already in the IRS's possession. Respondent's ability to comply with the summonses was never raised.[1)] Thereafter the District Court issued its order requiring respondent to appear and produce the records on February 4, 1980.

Respondent did appear on that date but did not bring the requested records. After being advised of his rights, respondent claimed he did not have the records. He declined to answer any questions.

The District Court then issued orders requiring respondent to show cause why he should not be held in contempt for failure to produce the records. At one point, respondent's son again wrote the court and, quoting from respondent, indicated that respondent did not have the requested records and could not produce

them.

The court appointed counsel to represent respondent on two occasions prior to the contempt trial. Respondent dismissed both counsel and filed a demand with the court for the appointment of "competent" counsel. The court left respondent with the choice of representing himself, hiring private counsel, or continuing with one of the two appointed counsel. Mr. Rylander would not expressly waive his right to counsel and demanded representation as late as the day of trial. Respondent was left with representing himself.

Respondent demanded a jury trial. The court refused because it specified that any penalty imposed would not exceed six (6) months imprisonment or a $500 fine.

A combined civil and criminal contempt trial was conducted on October 8, 1980. Respondent appeared but did not participate. The government's evidence established that the corporations had not been dissolved and that respondent had signed documents and conducted business prior to 1980. The government did not offer any proof of respondent's actual possession of the records, or their existence. However, the government's evidence did establish that respondent had repeatedly denied possessing the records.

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

Reasons For Denying The Petition

1. To understand the 9th Circuit's decision in this matter, one must begin by distinguishing civil and criminal contempt. The key determinant is the intended effect of the court's punishment. Punishment for civil contempt is usually intended to be remedial. That is, to induce compliance with the court's order. Whereas the intent of punishment for criminal contempt is punitive, to vindicate the authority of the court. United States v. Powers, 629 F.2d 619,627 (9th Cir.1980).

This distinction bears on the issues that are relevant at the time of trial. Whereas punishment for civil contempt must be lifted upon compliance with the underlying order. This is not true for criminal contempt. See United States v. Powers, supra, 629 F.2d at 627. Therefore, the alleged contemnor's ability to comply with the underlying order is relevant at each step of the civil contempt proceeding. The civil contempt punishment will not be imposed against one who connot comply with the order. See Maggio v. Zeitz, 333 U.S.56,75(1948).

However, in a criminal contempt proceeding, the alleged contemnor's ability to comply with the order is relevant only at the time specified for compliance. If he has the ability to comply with a valid court order and fails to do so, he is guilty. The fact that he may later be rendered unable to comply is irrelevant. Therefore, a defense based on inabilty to comply raised in a criminal contempt proceeding must focus on the compliance time specified in the order. This is the only manner in which the defense can be raised. However, the government would have

this Court rule the defense is completely unavailable simply because respondent did not appear at the summons enforcement hearing.

A conviction of criminal contempt will only lie where the alleged contemnor has willfully and contumaciously refused to comply with the underlying order. United States v. Joyce, 498 F.2d 592,596 (7th Cir.1974). It is an elementary conclusion that one who is unable to comply with a court order cannot wilfully disobey it. Therefore, the contemnor's ability to comply is an element of the offense which must be proven by the applicable standard of proof --- beyond a reasonable doubt. See United States v. Powers, supra, 629 F.2d at 626,n.6.

The government utterly failed to demonstrate respondent's ability to comply with the summons. It succeeded only in producing evidence that he was president of the subject corporations. There was no proof that the sought records ever existed or were ever in respondent's possession; nor were any facts reflecting on respondent's ability to comply proven at the enforcement hearing. The government made only the minimal showing of materiality and relevance required by United States v. Powell, 379 U.S.49(1964). The government proceeded by way of an offer of proof and the issue of respondent's ability to comply with the order was never tendered to the court.

2. It is a fundamental principle of due process that one cannot be convicted of a crime unless there is evidentiary proof of each element of the crime. Garner v. Louisiana, 368 U.S.157, 163-65(1961). Ability to comply is an element of criminal contempt by virtue of the "willfullness" requirement. The 9th Circuit has

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

simply held that the government cannot skirt this proof requi
ment by making reference to a prior proceeding where the issu
was neither raised nor proven.

While the defendant may have a burden of production re
garding his ability to comply, that requirement was satisfied
evidence of respondent's denials of possession was presented
the contempt trial. This created an issue of fact and there
no evidence introduced to demonstrate respondent did have the
ability to comply. The only conclusion the fact finder could
reach is that respondent was unable to comply with the order.

3. The Sixth Amendment right to counsel is fundamenta
and is applicable in criminal contempt proceedings. Richmond
Black Police Officers v. City of Richmond, 548 F.2d 123 (4th
1977). The defendant must be personally advised of the nature
the charges and possible penalties. See Farelta v. Californi
422 U.S.806,818-19 (1975).

If the defendant is to make a knowing and intelligent
waiver of his right to counsel, the defendant must be apprised
of the nature of the charges and their penalties. Without suc
information, he cannot make such a waiver United States v. H
683 F.2d 322,324 (9th Cir.1982), because his decision will not
be knowing and intelligent.

Here the record does not reflect that respondent was so
informed. The fact that other court records may have so infor
him is irrelevant. If a waiver is knowing and intelligent, th
accused must be fully informed of the charges at the time of t
purported waiver.

Though the court found respondent had indeed made a

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95813-9990

knowing and intelligent waiver, this finding is belied by the lack of evidence to support it. There is no indication in the record that respondent was informed of the nature of the charges and possible penalties. The finding is therefore irrelevant.

CONCLUSION

If petitioner's contentions are followed in this case, defendants in criminal contempt proceedings would be put to the task of proving their innocence beyond a reasonable doubt, instead of the government being put to the task to prove the criminal contempt conviction with sufficient evidence to establish proof beyond a reasonable doubt.

Further, in the case at bar, defendant was denied his Sixth Amendment right to counsel as the record does not indicate a knowing and intelligent waiver of counsel and demonstrate an understanding of the charges and possible penalties with which he was faced. In essence, at no point in either the summons enforcement or the trial did the government ever prove that defendant had the ability to comply with the court's order, therefore there is insufficient proof to find that he willfully violated such a court order.

DATED: January 4, 1984

MATHENY POINDMORE & SEARS

By: _____
JOSEPH F. HARBISON, III

_____
TIMOTHY P. MURPHY
Attorney at Law

LAW OFFICES
MATHENY, POINDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

LAW OFFICES
MATHENY, POIOMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95813-8990

END NOTES

1) In point of fact, none of the summonses should have ever been enforced by the court since they were issued during a criminal investigation in violation of defendant's rights. During Mr. Rylander's recent trial, District Court No. CR-S-82-50, 9th Circuit Docket No. 82-1627, Agent George Ogihara testified as follows:

CROSS-EXAMINATION

BY MR. HARBISON:

Q. Mr. Ogihara?

A. Yes, sir, that's correct.

Q. Correct Pronunciation?

A. That's correct, sir.

Q. I understand from your direct testimony, the first time you actually met Mr. Rylander was in Attorney Alvin Wohl's office on September 26, 1978?

A. That's correct.

Q. When, in fact, were you appointed to this case, meaning the Rylander case?

A. I was appoint -- assigned the case to jointly investigate the matter sometime in the summer of '78. I think around June. June of '78.

Q. Okay. Do you recall testifying in a court trial of October 8th, 1980 in this District. Eastern District in front of Judge Karlton?

A. Yes, I do.

Q. Okay, and I believe that's the same date you gave

at that time was June of 1978. Do you know when Agent VanDenBerg was appointed to this case?

A. I do not, sir.

Q. Was she appointed prior to the time that you were appointed?

A. The first indication I had that she and I were to investigate jointly was a receipt of an order from chief of examinations, San Francisco District so designating us as a joint investigation of the case.

Q. When you say a joint investigation, you mean yourself as a revenue agent and a special agent from the Criminal Investigative Division, do you not?

A. That's correct.

Q. And isn't it I.R.S. procedure when they are conducting a criminal investigation to appoint both a special agent such as Joan VanDenBerg and a revenue agent such as yourself?

A. I -- in this particular case, umm, I did not refer the case; it was assigned to me as a joint investigation and I had no information whatsoever as to the background of the case.

Q. Okay. I'm asking you in general, is it not the I.R.S.'s procedure when they are conducting a criminal investigation to appoint a special agent from the Criminal Investigative Division and assign to that agent, to assist that agent, a

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revenue agent such as yourself? Isn't that the procedure?

A. That's correct, but it's essentially -- the return was assigned to me. That's the internal procedures.

Q. Okay. Was there any doubt in your mind that Agent VanDenBerg was a criminal investigator?

A. No, sir.

Q. And was there any doubt in your minds that what you were conducting and assisting her in was, in fact, not a civil investigation, but a criminal investigation?

A. Well, at the time, that determination was not made. So, put it this way, I didn't know how it was going to turn out.

Q. And Mr. Ogihara, do you remember giving this testimony -- and again, I'm quoting from the reporter's transcripts of a trial date of October 8th, 1980, Eastern District in front of Judge Karlton.

The court asked you: "Mr. Ogihara, you indidated your function being present was to be as a witness to the proceedings?" Answer: "That's true, sir." Question by Judge Karlton: "You were not there because you were conducting a special separate and civil investigation?" Answer: "That's correct, sir." Question by the judge: "It's correct that you were not?"

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POST OFFICE BOX 13711
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Answer: "That's correct, that I was not."
Question: "How do you know that Miss VanDenBerg was conducting a criminal investigation? Did she tell you that?"
Answer: "No, sir, that -- I received a notification from San Francisco District sometime in late '78 that I was to assist Miss VanDenBerg." Question by the judge: "and that characterized it as a criminal investigation?" Answer: "It was characterized as such, yes, sir, that's correct."
Question: "You received this notification from where?" And you went on to say "District Office."
So when you testified back in 1980, there was no doubt in your mind that what you were involved in was a criminal investigation?

A. Potentially, it may lead to one.
Q. Potentially, it may lead to one?
A. Yes, sir, that's correct.
Q. We are here today, aren't we?
(No response.)

See also Agent Joan VanDenBerg's testimony, pages 271 through 323 wherein the IRS Agent initially refused to honor the court subpoena to testify at trial, and then upon appearing, claimed to have suffered a nervous breakdown and was unable to recall any of her previous testimony, and specifically the numerous

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POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

times that she claimed to be conducting a civil investigation when in fact she was conducting a criminal investigation.

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MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

LAW OFFICES
MATHENY, PODMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95813-9990

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am a resident of the county aforesaid; I am over the age of eighteen (18) years and not a party to the within entitled action; my business address is 2100 Northrop Avenue, Sacramento, CA 95825.

On January 5, 1984, I served the within OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Supreme Court of the United States
Washington, D.C. 20543

Pursuant to Rule 28, all parties required to be served, have been served.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 5, 1984 at Sacramento, CA.

Kaye Curtin

KAYE CURTIN

Office - Supreme Court, U.S.
FILED
JAN 17 1984
ALEXANDER L. STEVAS
CLERK

No. 83-906

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD W. (DICK) RYLANDER, SR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In his brief in opposition, respondent does not address the fundamental questions raised in the petition. He does, however, make several assertions that warrant brief response.

Respondent contends that the government failed to establish his ability to comply with the summonses. In so urging, he continually fails to recognize the impact of a summons enforcement order in establishing one's ability to comply. In *United States* v. *Rylander (Rylander I)*, No. 81-1120 (Apr. 19, 1983), slip op. 8, this Court made clear that the enforcement "order, unappealed from, necessarily contained an implied finding that no defense of lack of possession or control had been raised and sustained in that proceeding." The Court also held (*ibid.* (emphasis in original)) that the only defense open to Rylander in contesting the civil contempt proceeding was his "inability to *then*

produce." As respondent admits (Br. in Opp. 3), however, this defense is not available in a case of *criminal* contempt. Thus, if, at the time of the enforcement hearing, respondent had the ability to comply with a valid court order, his failure to do so established his criminal contempt.

As this Court recognized last Term, on this very same record, implicit in the enforcement order is a finding of respondent's ability to comply with that order. *Rylander I*, slip op. 9 n.3. Thus, respondent's assertion here (Br. in Opp. 2) that the government's proof at the contempt trial established that he had previously denied possession of the records does nothing to advance his cause. This Court found such denials to be inadequate (*Rylander I*, slip op. 5 (citation omitted)) ("the District Court was entirely justified in concluding, as it did, that Rylander 'failed to introduce any evidence at the contempt trial' ").[1] Accordingly, it upheld the finding of civil contempt until such time as Rylander "adduces evidence as to his present inability to comply" (slip op. 9). In the absence of any legitimate defense, supported by competent evidence, respondent's criminal contempt was established by his failure to comply with a valid court order.[2]

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[1]See Br. in Opp. 2: "Respondent appeared [at the contempt trial] but did not participate."

[2]Respondent makes the bald assertion that the summonses should not have been enforced because "they were issued during a criminal investigation in violation of defendant's rights" (Br. in Opp. 7). There is no merit to this contention. The investigation was conducted as a joint investigation, one in which both a special agent and a revenue agent conduct an examination. The primary function of the revenue agent is to ascertain the taxpayer's correct tax liability (Tr. 194).

Moreover, Department of Justice records indicate that the Service's recommendation for criminal prosecution of Rylander for willfully failing to file income tax returns for the years 1975 through 1977 was not made until May 22, 1981, long after the issuance of the summonses in this case. Thus, the fact that respondent was subsequently prosecuted has no bearing on the validity of the summonses at issue here. See

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

JANUARY 1984

United States v. *LaSalle National Bank*, 437 U.S. 298 (1978); *Couch* v. *United States*, 409 U.S. 322, 329 n.9 (1973).

While this challenge to the summonses has no merit, respondent's belated effort to raise it serves to underscore the wisdom of the requirement that defenses to a summons must be raised at the enforcement hearing. *United States* v. *Powell*, 379 U.S. 48, 58 (1964). If respondent's newly claimed defense had a factual basis, and if it were raised and established at the appropriate time, the summonses would not have been enforced and the parties would have been spared the ensuing, protracted litigation. The orderly and efficient functioning of court processes thus requires and fully supports the rule that such defenses may not be raised after the enforcement hearing. *Rylander I*, slip op. 4-5; cf. *United States* v. *Bryan*, 339 U.S. 323 (1950); *United States* v. *Fleischman*, 339 U.S. 349 (1950); see also *United States* v. *Euge*, 444 U.S. 707 (1980).